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Overnite Transportation Company and Highway, City and Air Freight Drivers, Dockmen, Marine Officers Association, Dairy Workers, and Helpers, Local Union No. 600, affiliated with the International Brotherhood of Teamsters, AFL-CIO. Cases 14-CA-25643, 14-CA-25777, and 14-CA-25839

September 28, 2001

DECISION AND ORDER

BY MEMBERS LIEBMAN, TRUESDALE, AND WALSH

On April 30, 2001, Administrative Law Judge Robert A. Pulcini issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief. The Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified and set forth in full below.

In its exceptions, the Respondent contends that the judge decided the credibility issues in this case based on the Respondent's prior unfair labor practices and that the judge thereby violated Rule 404 of the Federal Rules of Evidence.¹ For the reasons set forth below, we reject the Respondent's claim of error in the judge's decision.

To be sure, a judge's reliance on a previous Board determination that a party violated the Act as a basis for concluding that it similarly violated the Act in a later

proceeding would be inconsistent with Rule 404. See *T.K. Productions Inc.*, 332 NLRB No. 14 slip op. at 2 fn. 3 (2000) (Rule 404 prohibits the use of prior acts to "demonstrate a corporate character which tends to show that Respondent behaved similarly in the incidents set forth in the complaint."). See also *Armour Con-Agra*, 291 NLRB 962, 965 fn. 9 (1988) (acknowledging that Rule 404 "bars proof of 'other crimes or wrongs' to prove that [a respondent] was guilty of similarly unlawful acts[.]")² As discussed below, careful examination of the judge's decision demonstrates that his credibility findings do not run afoul of Rule 404.

We recognize, as the Respondent emphasizes in its brief, that the fourth paragraph of the judge's decision includes the following statement:

All of the events in the instant case have a highly charged, polarized atmosphere as a backdrop, familiar ground for the parties in this case. See *Overnite Transportation Co.*, 296 NLRB 669 and *Overnite Transportation Co.*, 329 NLRB No. 91, Slip Op. at 64. I have taken into account the history of this Respondent in assessing the various issues of this case, giving this history significant weight. *Florida Steel Corp.*, 231 NLRB 651, 658 (1977).³

However, we reject the Respondent's contention that this statement establishes that all of the judge's credibility resolutions are necessarily tainted by reliance on Overnite's past violations of the Act. Consistent with the "Background" heading of the section in which this statement appears, we believe that it should be read as a general reference to the consideration that the judge would later give the Respondent's history, in the context of his particular findings. But those findings need to be reviewed individually to determine if the judge violated Rule 404 by using the Respondent's prior unfair labor practices as a basis for concluding that it committed them in this case. This is particularly true because the judge dismissed one of the complaint allegations, demonstrating that he did not reflexively rule against the Respondent.

¹ Fed.R.Evid. 404 states in relevant part:

(a) Character Evidence Generally.—Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of Accused.—Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

...

(b) Other Crimes, Wrongs, or Acts.—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident ...

² On the other hand, as the Respondent acknowledges in its brief, Rule 404 does not bar use of prior violations for other purposes, such as showing an unlawful motive for an employee's discharge (see e.g., *Kenworth Trucks of Philadelphia*, 236 NLRB 1299 fn. 2 (1978), enf. mem. 595 F.2d 1213 (3d Cir. 1979), or justifying a more extensive remedy (see, e.g., *Hickmott Foods*, 242 NLRB 1357 (1979)).

³ The complete case citations are as follows: *Overnite Transportation Co.*, 296 NLRB 669 (1989), enf. 938 F.2d 815 (7th Cir. 1991); *Overnite Transportation Co.*, 329 NLRB 990 (1999), enf. 240 F.3d 325 (4th Cir. 2001), rehearing granted and panel opinion vacated (July 5, 2001); *Florida Steel Corp.*, 231 NLRB 651 (1977), enf. denied 586 F.2d 436 (5th Cir. 1978).

Accordingly, we now turn to examine the two instances in which the judge credited the General Counsel's witnesses over the Respondent's and concluded that violations of the Act were established.

The Allegation Concerning Employee Roy Miller

The judge concluded that the Respondent violated the Act by threatening employee Roy Miller with disciplinary action if he crossed a picket line. In doing so, the judge credited Miller's testimony that the Respondent's St. Louis terminal manager, Ronald Huck, told Miller that, if he did not cross a picket line erected by the Union at the Respondent's Memphis, Tennessee facility, Miller's benefits would be canceled and Huck would take disciplinary action against Miller. The judge described Miller's testimony as "direct, unaffected and unvarnished." Although Huck denied threatening Miller with discipline, the judge was not persuaded by Huck's testimony, stating that Miller's account was bolstered by the event that followed,⁴ which the judge characterized as "consistent with someone who has been threatened in a situation like Miller was in." Thus, contrary to the Respondent's assertion, the judge's credibility determinations regarding this incident were made without reference to the Respondent's previous misconduct.

The Allegation Concerning Employee Virgil Thomas

The judge also concluded that the Respondent violated the Act by soliciting employee Ralph Rice to circulate a union decertification petition and offering to pay Rice for time spent circulating the petition. In so concluding, the judge credited employee Virgil Thomas' testimony that he overheard Supervisor Rodney Reiter tell employee Ralph Rice, in the presence of two other individuals, that "we need you to hurry up and get that . . . decert list going again because . . . there are no charges and they can't stop it now . . . [W]e'll pay you for your time." All of the individuals Thomas said were involved in this incident denied that any such conversation or event took place.

In his analysis of conflicting testimony, the judge stated: "I was more influenced by the demeanor of Thomas while testifying than the other witnesses to this event. He was sure in his recollection and did not waiver [sic] under cross-examination." The judge also stated that "the ensuing events involving Rice have a persuasive symmetry to them that leads me to conclude that Respondent acted to foster and promote the filing of a decertification petition[.]" Further, the judge specifically discredited Rice's testimony, stating that he "left the dis-

tinct impression of an antipathy towards the Union so virulent that I cannot place any reliance in any of his testimony about it as being an accurate reflection of the truth." In rejecting the testimony of the Respondent's other witnesses, the judge cited the persuasiveness of Thomas' demeanor.⁵ Thus, we conclude that the judge's decision to credit the testimony of Thomas over that of Rice and the Respondent's other witnesses was properly based on demeanor factors, not the Respondent's prior unfair labor practices.

Although the judge considered the Respondent's history in addressing this complaint allegation, he did so only in the course of rejecting two of the Respondent's arguments: (1) that four of its witnesses would never collude to testify falsely; and (2) that it trained its supervisors not to become involved in decertification efforts. With respect to the first argument, the judge stated: "The past history of this Respondent, in this case, makes this event completely conceivable and even highly probable." With respect to the second, the judge stated: "I can place no reliance on this assertion, given the history of the parties, of bitter labor strife and unresolved conflict, driven by this Respondent's previous misconduct."

By offering these defenses, the Respondent is clearly contending that the complaint allegations are simply not consistent with either the character of its supervisors or the general corporate ethics that it has attempted to promote. Where a party presents its corporate character as a defense to an allegation of illegal conduct, it is not erroneous for a judge to reject that defense based on character evidence. Indeed, Rule 404 specifically provides that character evidence may be offered "by the prosecution to rebut" character evidence "offered by an accused."⁶

⁵ The judge stated that accepting the version of events offered by the Respondent's witnesses would require that he "conclude that Thomas invented the conversation he spoke of out of whole cloth. I am satisfied that this is not the case based on my observation of him."

⁶ In criminal law, this is known as the "open the door" doctrine. As the court stated in *U.S. v. Monteleone*, 77 F.3d 1086, 1089 (8th Cir. 1996):

Generally, the contemporary Rules prohibit the Government from introducing evidence of the defendant's immoral character in an attempt to establish his propensity to engage in criminal behavior. Fed.R.Evid. 404; *Michelson v. United States*, 335 U.S. 469, 475-76, 69 S. Ct. 213, 218-19, 93 L. Ed. 168 (1948). Character evidence is undeniably relevant in determining probabilities of guilt, however, and for this reason the defendant is free to present evidence, in the form of opinion or reputation testimony, of pertinent favorable character traits. Fed.R.Evid. 404(a)(1), 405(a); *Michelson*, 335 U.S. at 476, 69 S.Ct. at 218-19. Where the defendant chooses this perilous path, though, he opens the door for the prosecution to introduce in rebuttal its own opinion or reputation evidence regarding the defendant's character.

Here, by asserting its corporate character as a defense, the Respondent opened the door to the judge's use of the prior decisions to reject the Respondent's arguments.

⁴ It was not disputed that, although Miller crossed the picket line, he called in sick on the next day due to stress.

Thus, we conclude that the judge's use of character evidence in this limited respect did not run afoul of Rule 404.

Conclusion

For the reasons stated above, we reject the Respondent's assertion that the judge erroneously relied on the Respondent's prior unfair labor practices to establish that the Respondent violated the Act in this case. Rather, we find that his credibility determinations were properly made on the basis of the evidence adduced in this proceeding. In addition, the clear preponderance of all the relevant evidence has not convinced us that the judge's credibility determinations are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We therefore affirm the judge's findings that the Respondent violated Section 8(a)(1) of the Act.⁷

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 4.

"4. By fostering and aiding a Union decertification attempt by soliciting an employee to circulate a decertification petition and offering to pay the employee for time spent in circulating the petition, the Respondent violated Section 8(a)(1) of the Act."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Overnite Transportation Company, St. Louis, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with disciplinary action for failing or refusing to cross a union picket line.

(b) Fostering and aiding a union decertification attempt by soliciting employees to circulate a decertification petition and offering to pay employees for their time so spent.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in St. Louis, Missouri copies of the attached notice marked "Appendix."⁸ Copies of the notice, on

forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 6, 1999.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 28, 2001

Wilma B. Liebman, Member

John C. Truesdale, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the

National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection

⁷ We shall modify the judge's conclusions of law, recommended Order, and notice to conform to the violations found by the judge.

⁸ If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judge's

ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten our employees with disciplinary action for failing or refusing to cross a union picket line.

WE WILL NOT foster and aid a Union decertification attempt by soliciting employees to circulate a decertification petition and offering to pay employees for their time so spent.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

OVERNITE TRANSPORTATION COMPANY

Sharon L. Steckler, and *Mary Tobey, Esqs.*, of St. Louis, Missouri, for the General Counsel.

Jay Swardenski, Esq. (Matkov, Salzman, Madoff & Gunn), of Chicago, Illinois, for the Respondent.

Lany Tinker Jr., of St. Louis, Missouri, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. PULCINI, Administrative Law Judge. This case was tried in St. Louis, Missouri on February 5, 2001. Charges were filed respectively on July 8, 1999, October 4, 1999 and November 18, 1999.¹ A consolidated complaint was issued on December 28th. Thereafter, one of the cases involved in this complaint was dismissed and a consolidated amended complaint was issued March 31, 2000. This was further amended on January 31, 2001. The complaint alleges that Overnite Transportation Company (the Respondent) committed certain violations of the National Labor Relations Act (the Act). The Respondent timely filed an answer to the consolidated complaint denying that it had committed any violation of the Act. At hearing, all parties were given a full opportunity to present evidence and argument. Briefs submitted by the General Counsel and Respondent have been given due consideration. On the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Virginia corporation, is engaged in the transportation of freight at its facilities in Bridgeton and St. Louis, Missouri, where it annually derives revenues in excess of \$50,000 from the transportation of freight from its facilities in the state of Missouri directly to points outside of the State of Missouri. The Respondent admits and I find that it is an em-

ployer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Highway, City and Air Freight Drivers, Dockmen, Marine Officers Association, Dairy Workers, and Helpers, Local Union No. 600, affiliated with the International Brotherhood of Teamsters, AFL-CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent operates its business nationwide with 29 terminals located in 12 states including the Missouri facilities involved in this case. The Union has represented the Respondent's drivers at the St. Louis, Missouri facilities since 1995. The St. Louis facility employs 19 road drivers and approximately 18 city drivers. Various locals of the parent Teamsters Union represent Respondent's employees at other facilities nationwide. On or about Tuesday, July 6, Teamster locals struck Respondent at five or six locations including Memphis, Tennessee and Indianapolis, Indiana. This strike lasted approximately 3 days. It presaged a company-wide strike by the Teamsters beginning on October 24, which continued through the date of the hearing in these matters.

On July 26, a road driver named Ralph Rice filed a decertification petition in Case 14-RD-1653. This was dismissed. On October 18, an employee named William Collins filed a decertification petition, which was similarly dismissed. On January 24, 2001, another employee named Jerold Swain filed a decertification petition, which, at the time of hearing, was still pending disposition by General Counsel. All of the events in the instant case have a highly charged, polarized atmosphere as a backdrop, familiar ground for the parties in this case. See *Overnite Transportation Co.*, 296 NLRB 669 (1989), and *Overnite Transportation Co.* 329 NLRB 990, 1053 (1999). I have taken into account the history of this Respondent in assessing the various issues of this case, giving this history significant weight. *Florida Steel Corp.*, 231 NLRB 651, 658 (1977).

B. Allegations Concerning Roy Miller

Roy Miller worked for the Respondent for nearly 11 years at its St. Louis facility. He was a union steward. Drivers like Miller obtained assignments or "runs" from the dispatcher. On July 5, that person was Linda Wnuk, whom Miller called to select his run for the week. He chose the Memphis, Tennessee run to begin at 9 p.m. on the 6th.

Miller telephoned Respondent's terminal on the morning of July 6th because of some "insurance problem" he was having. Miller spoke to Randy Jones, the operations manager, who began the conversation by commenting that he "figured" Miller would be "out striking." Miller asked Jones what he was talking about and Jones told him of the strike at some of the terminals. Miller ended the conversation and then called Union Business

¹ All dates are in 1999 unless otherwise indicated.

Agent Larry Tinker about it. Tinker knew as little about the strike as Miller. Tinker told Miller he would get back to him shortly, and did, telling him that six terminals were on strike and that Memphis, Tennessee was one of them. That afternoon, Miller called the terminal to avoid taking the Memphis run. He spoke to Wnuk who told him he had to take the run. Miller said he would not cross the picket line. Wnuk called Miller back 15 minutes later. She told him that she had spoken to Terminal Manager Ronald Huck and that he said that Miller must go to Memphis and cross the picket line or his benefits would be ceased. Miller asked to speak to Huck. According to Miller, he asked Huck if he was being forced to cross the picket line in Memphis, and was told that if he did not his benefits would be canceled and upon his return Huck would take “disciplinary action” against him. Huck denies saying anything about discipline. Miller drove the run, crossed the picket line in Memphis and the next day went on sick leave for stress.

Analysis and Conclusions

I credit Miller’s version of the events in this matter. His testimony was direct, unaffected and unvarnished. The chain of events in this matter, beginning with the round of phone calls to and from Miller on July 6th, reveals him as a person overwrought with the conflict between his obligations as a driver and union official. Huck’s denial that he threatened Miller is trumped by the inability of Miller to deal with the conflict of crossing a picket line under duress, a fact established by Miller’s going on sick leave for “stress” the next day. There is nothing in the record to challenge the legitimacy of Miller’s condition, which I find consistent with someone who has been threatened in a situation like Miller was in. Respondent attempted to impeach the testimony of Miller by assailing his reputation for truthfulness. It failed for the reasons I have stated above.

It is a well-established principle that an employee who refuses to cross a picket line engages in protected activity having made “common cause” with the strikers. *ABS Co.*, 269 NLRB 774 (1984). It follows, inexorably, that Respondent’s threatening Miller with “disciplinary action” for engaging in such activity violates Section 8(a)(1) of the Act precisely as General Counsel suggests.

C. Allegations Concerning Alan Agee²

Respondent employed Alan Agee, a driver, for approximately 13 years. He is a striking employee. At the time of the events here, Linda Wnuk supervised Agee. Wnuk, in turn, reported to Joe Bill Peters, the terminal manager. Regional Man-

ager Steve Smith had overall responsibility for this and other facilities.

Agee contends that in the late summer or early fall of 1999, he was assigned a run to Indianapolis, Indiana. When he arrived at this site, he found it struck by the Teamsters Union. Agee crossed the picket line and completed his task. When he returned to St. Louis, Missouri, his dispatch point, he went in search of Steve Smith to ask about the requirement to cross picket lines. Agee spoke to Smith about what he should do and alleges that Smith told him that if he did not cross the picket line, Agee would have to “find his own way home.” Agee stated that Smith told him that if he did not cross the picket line, he would be terminated. Joe Bill Peters is alleged by Agee to have been present during this conversation.³ When Peters testified, he denied being present and stated that he did not even report to the St. Louis facility until August 23 some 7 weeks after Agee’s best recollection of the time frame of this conversation. This latter assertion went unchallenged by General Counsel.

Analysis and Conclusions

Respondent argues that Agee’s first recollection of these events was only a few weeks before the amendment some 18 to 20 months after the purported events. Agee, it argues, was unclear as to the timing of this conversation: and was incorrect as to who was present. On the other hand, the General Counsel contends that the history of this Respondent in dealing with the Union indicts it as an entity demonstrating a “willingness to exceed the bounds of what it could lawfully do.” I believe that both Respondent and General Counsel have points in their favor on this issue. However, in assessing credibility in this matter, I am troubled by the remoteness in time to the event in question to Agee’s first recollection of it. His testimony was unclear as to the time of the event, and even as to whom was present during the conversation. Respondent presents a better argument here. I cannot place enough reliance in Agee’s skewed version of these events to find that Steven Smith threatened him in the manner General Counsel alleges despite Respondent’s notorious history of antiunion behavior. I conclude there is no merit to this allegation and I recommend its dismissal.

D. Allegations Concerning Solicitation of Employees to Decertify by Petition

A total of three decertification petitions were filed involving the parties in this matter. An employee named William Collins on October 16 filed the second of these. The Regional Director dismissed this on August 22, 2000. Virgil Thomas is a city driver for Respondent. He has also been a shop steward for the Union and is one of the striking employees. Thomas reported to

² The allegation of a threat levied against employee Agee by Respondents Regional Manager was added to the complaint in these matters, as indicated above, on January 31, 2001. Respondent objected to this amendment at hearing because of the timing of it. I deferred ruling on this matter and directed that the issue be litigated. Respondent has withdrawn objections to the amendment by the General Counsel in its brief. The issue is therefore moot.

³ Smith recalled the conversation but stated it was a one-on-one encounter and that Agee was never told that he would be terminated for honoring the picket line. Smith’s clear recollection is that Joe Bill Peters was not present during this event.

work one day in the fall of 1999. Thomas alleges that while waiting to receive his paperwork for his run on this occasion sometime between 8:30 and 9 a.m., he saw and overheard a conversation the main office area between Joe Bill Peters, driver-employee Ralph Rice, and city dispatcher Rodney Reiter. Linda Wnuk was also present sitting at her work area and uninvolved in this conversation.⁴

The main office area has a window wall separating it from the driver's lounge and waiting area. Thomas initially was some four feet from this window but then positioned himself to eavesdrop on the conversation, when he saw Peters enter the office area with Rice. According to Thomas, Dispatcher Reiter said to Rice, "We need you to hung up and get that deceit list going again because there are no charges and they can't stop it now." Reiter went on to tell Rice that that the company would pay him for his time, to which Rice allegedly responded "Okay".

Thomas was on the dock waiting for his truck to be loaded shortly after this event, at about 9 a.m. He alleges he saw and overheard Rice soliciting employees to sign a petition. He claims that he walked up and spoke to Rice and asked him why he had not solicited him to sign. He received no response. All of the individuals Thomas said were involved in this event testified including Linda Wnuk. Each of them denied that any such conversation or event took place.

Analysis and Conclusions

Respondent defends its position here with a four-point argument. Its first point is that the event never took place. Respondent states in its brief "It is inconceivable that four people would state unequivocally that something didn't happen if it in fact did." I find this argument fatuous and reject it completely. The essence of the type of misbehavior alleged is that a Respondent's agents conspiratorially come together to engage in the common enterprise of undermining a union's status. The past history of this Respondent, in this case, makes this event completely conceivable and even highly probable.

Respondent's second point is that the Union delayed by some weeks filing a charge in this matter, as opposed to immediately filing it, as it did in the Thomas matter discussed above. This fact conveys nothing to support the Respondent's case. The Union's motivation in choosing the timing for filing the charge in this matter is a red herring, having nothing to do with the merits of this issue.

Respondent makes much of its third and fourth points. It argues that Reiter and Rich had little reason to have contact with one another. Reiter was not even his supervisor and Rich purportedly disliked Reiter for various reasons. Most importantly, Respondent stresses how it has trained its managers to say nothing about union matters especially decertification issues.

In my assessment of the credibility issues in this matter, I was more influenced by the demeanor of Thomas while testify-

ing than the other witnesses to this event. He was sure in his recollection and did not waiver under cross-examination. Moreover, if I accept Respondent's rendition of events, I must conclude that Thomas invented the conversation he spoke of out of whole cloth. I am satisfied that this is not the case based on my observation of him. The circumstances Thomas described and the ensuing events involving Rich have a persuasive symmetry to them that leads me to conclude that Respondent acted to foster and promote the filing of a decertification petitions.⁵ I conclude that Thomas's version of what occurred is reasonably accurate. Finally, Respondent advances the virtuousness of its supervisors as a reason why this event could not have happened as Thomas recounted it. I can place no reliance on this assertion, given the history of the parties, of bitter labor strife and unresolved conflict, driven by this Respondent's previous misconduct.

The right to solicit, prepare and file a decertification petition is the right of employees alone. An employer is not privileged to circulate or sign a decertification petition. In fact, it can have no legitimate role in the instigation and circulation of such a petition. *Caterair International*, 309 NLRB 869 (1992). See also *Cypress Lawn Cemetery Assn.*, 300 NLRB 609, 626, 627 (1990). A Respondent acts at its peril and violates Section 8 (a)(1) of the Act, when it engages, as here, in fostering and aiding a decertification attempt.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By threatening an employee with disciplinary action if he crossed a picket line, Respondent engaged in unfair labor practices violated Section 8 (a)(1) of the Act.
4. By soliciting and bribing an employee to circulate a decertification petition, the Respondent violated Section 8(a)(1) of the Act.
5. The above-described conduct are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.
6. Except as found above, the Respondent has not engaged in any other unfair labor practices.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

⁵ Rich testified at length denying the essential elements of Thomas's allegations, but admitting that he was involved in a decertification attempt. He also left the distinct impression of an antipathy towards the Union so virulent that I cannot place any reliance in any of his testimony about it as being an accurate reflection of the truth.

⁴ Thomas alleges that Wnuk was sitting at her work area. Wnuk disputes this claiming that she did not come to work until 10 a.m.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶

ORDER

The Respondent, Overnite Transportation Company, St. Louis, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with disciplinary action if they fail or refuse to cross a picket line.

(b) Soliciting, encouraging or bribing employees to circulate a decertification petition.

(c) In any like or related manner interfering with, restraining, coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facilities in Bridgeton and St. Louis, Missouri notice marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places

⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

where notices to employees are customarily posted by the Respondent. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 6, 1999.

Dated, Washington, D.C. April 30, 2001

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten our employees with disciplinary action for failing or refusing to cross a union line.

WE WILL NOT solicit, assist or bribe any employee to circulate a decertification petition at any of our facilities.

OVERNITE TRANSPORTATION COMPANY